

ESTTA Tracking number: **ESTTA706796**

Filing date: **11/05/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91224239
Party	Plaintiff Foto Electric Supply Co., Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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Date	11/05/2015
Attachments	91224239 Motion to Dismiss Count II.pdf(113192 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**IN THE MATTER OF Trademark Serial No. 86/492,385
For the mark PROTECTING DRIVERS EVERYWHERE;
Published on June 9, 2015**

FOTO ELECTRIC SUPPLY CO., INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91224239
)	
MAVSAK, INC.,)	
)	
Applicant.)	
)	

APPLICANT’S MOTION TO DISMISS COUNT II

Applicant Mavsak, Inc., by counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, incorporated herein by 37 C.F.R. § 2.116, submits this Motion to Dismiss Count II of the Notice of Opposition for Failure to State a Claim Upon Which Relief Can Be Granted.

1. Count II of Opposer’s Notice of Opposition asserts as grounds for opposing the disputed mark that the mark has not been used by applicant for all of the goods recited in the opposed application. (Opp. at ¶¶ 10, 16-17.)

2. Specifically, the opposed application was filed for “Camcorders; Cameras; Dashboard cameras; Lenses for cameras; Video cameras,” in International Class 009.

3. The Notice of Opposition does not contest that Applicant has used the disputed mark in connection with *some* of the goods listed in the opposed application. Rather, the Notice of Opposition merely alleges that Applicant has not used the mark in connection with “lenses for cameras.” (Opp. at ¶¶ 10, 16-17.)

4. Lack of use of a disputes mark in connection with some—but not all—of the goods or services listed on an application is not, in itself, sufficient grounds to oppose an application.

5. To the extent that Opposer is alleging as a basis for opposition that the inclusion of additional goods in the listing of goods and services constitutes a fraud on the Trademark Office, the Notice of Opposition fails to state a claim for fraud because (1) the alleged fraud is not pled with the particularity required by Fed. R. Civ. P. 9(b), and also because (2) the Notice of Opposition fails to plead any facts related to either a *material* misrepresentation of fact or to the requisite *fraudulent intent*. See *In re Bose Corp.*, 580 F.3d 1240 (Fed. Cir. 2009).

6. Alternately, to the extent that Opposer is requesting a restriction of the opposed registration under 15 U.S.C. § 1068, the Notice of Opposition also fails to state a claim because such a restriction is only available in cases in which a likelihood of confusion is alleged. 15 U.S.C. § 1068. No likelihood of confusion is alleged by Opposer, who relies only on descriptiveness as the basis for the opposition.

7. Accordingly, Count II of the Notice of Opposition fails to state a claim upon which relief can be granted.

CONCLUSION

WHEREFORE, Applicant respectfully requests that the Board grant Opposer’s Motion to Dismiss Count II and that Count II of the Notice of Opposition be dismissed with prejudice.

DATED this 5th day of November 2015.

Respectfully submitted,

MAVSAK, INC.
Applicant,
By counsel,

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this Answer and Affirmative Defenses is being electronically filed using the Electronic System for Trademark Trials and Appeals (ESTTA) on this 5th day of November 2015.

/David Ludwig/
David Ludwig

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon Opposer by ESTTA and also by depositing one copy thereof in the U.S. Mail, First Class, postage prepaid, on this 5th day of November 2015, addressed as follows:

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